

Read Appeal of Denial of Natural Resources Protection Act Permit for  
Residential Pier

- Department Order Appealed



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
17 STATE HOUSE STATION  
AUGUSTA, ME 04333

DEPARTMENT ORDER

IN THE MATTER OF

RICHARD AND MARGERY READ  
Castine, Hancock County  
RESIDENTIAL PIER  
L-25839-4P-A-N (denial)  
L-25839-TW-B-N (denial)  
L-25839-FS-C-N (denial)

) NATURAL RESOURCES PROTECTION ACT  
) COASTAL WETLAND ALTERATION  
) WATER QUALITY CERTIFICATION  
) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act, the Department of Environmental Protection has considered the application of RICHARD AND MARGERY READ with the supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. Summary: The proposed project site is located on Hatch Cove, on Moore Farm Road in the Town of Castine. The applicants propose to construct a four-foot wide by 100-foot long residential pier, with a three-foot wide by 30-foot long ramp and a three-foot wide by 16-foot long ramp, and six four-foot wide by 16-foot long seasonal floats. The floats would be stored on the upland in the off-season.

B. Current Use of the Site: The project site contains a home and an existing temporary dock.

2. EXISTING SCENIC, AESTHETIC, RECREATIONAL OR NAVIGATIONAL USES:

An applicant must demonstrate that a proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of a protected natural resource. To address the issue of potential impacts to scenic and aesthetic uses of the coastal wetland, in accordance with Chapter 315 of the Department's rules, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses, the applicants submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application along with a description of the property and the proposed project. The applicants also submitted several photographs of the proposed project site. Department staff visited the project site on November 14, 2012.

The proposed project is located on Hatch Cove, which is a scenic resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural visual qualities. The project would extend approximately 196 feet into Hatch Cove. At the project location, Hatch Cove is approximately 1,350 feet wide. The proposed structure is proposed as a replacement for an existing seasonal structure. A seasonal residential pier is also

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located approximately 350 feet away from the proposed structure location on the abutting property.

The proposed project was evaluated using the Department's Visual Impact Assessment Matrix and was found to have an acceptable potential visual impact rating on that matrix, due to the presence of seasonal structures on the subject and adjacent properties. Based on the information submitted in the application, the visual impact rating and the site visit, the Department determined that the location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristics found within the viewshed of the scenic resource in the project area.

The Department of Marine Resources (DMR) stated that the proposed project should not cause any significant adverse impact to navigation or recreation.

The Department did not identify any issues involving existing recreational and navigational uses.

The Department finds that the proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses of the protected natural resource.

3. SOIL EROSION:

An applicant must demonstrate that the proposed activity would not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment. The applicants submitted an erosion control plan in which they propose to utilize erosion control BMPs during construction to stabilize the work area.

The Department finds that the applicants adequately demonstrated that the proposed activity would not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.

4. WETLANDS AND WATERBODIES PROTECTION RULES:

The applicants propose to directly alter 8 square feet of coastal wetland to construct the proposed residential pier. Approximately 922 square feet of indirect impact due to shading is also proposed. The proposed structure would extend approximately 196 feet into Hatch Cove, approximately 100 feet longer than the existing seasonal float configuration.

The Wetland Protection Rules interpret and elaborate on the NRPA criteria for obtaining a permit. The rules guide the Department in its determination of whether a project's impacts would be unreasonable. A proposed project would generally be found to be unreasonable if it would cause a loss in wetland area, functions and values and there is a practicable alternative to the project that would be less damaging to the environment. The Wetland Protection Rules define the functions of a wetland to include wildlife habitat. Each application for a Natural Resources Protection Act permit that involves a coastal wetland alteration must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist.

The applicants submitted an alternatives analysis for the proposed project completed by Lawrence Billings and dated November 2012. The applicants state the project is proposed to allow the existing six floats to extend further into Hatch Cove, allowing tidal access over a longer period of time. The applicants currently use stairs, and temporary structures consisting of a series of six

floats and two ramps to access the water. The current configuration provides partial tide access for the applicants. The application indicates that the applicants' boat is 12 feet long and has a draft of one foot. The applicants did not demonstrate how their current access to the water is impracticable given the size of the boat and stated project purpose. The nearest public facility is 2.5 miles from the project site. The applicants have not demonstrated that the use of the public facility is not a practicable alternative, nor that the use of a private facility located five miles from the property is unreasonable. The applicants did not demonstrate that alternative designs that would have less impact on the significant wildlife habitats present at this location were not practicable.

When impacts to a wetland are proposed, in order to demonstrate that they are not unreasonable impacts, the amount of coastal wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The applicants have failed to demonstrate that the current seasonal configuration does not provide adequate boating access. As the applicants are recreational boaters, all-tide access is not required for the project. Additionally, the applicants have not demonstrated that a fixed pier plus one float is not a reasonable alternative, as discussed in Finding 5.

The Department finds that the applicants have not avoided and minimized coastal wetland impacts, particularly the impacts to Significant Wildlife Habitat discussed below, to the greatest extent practicable, and have not demonstrated that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project.

5. HABITAT:

An applicant must demonstrate that the proposed activity would not unreasonably harm listed habitats or fisheries, including significant wildlife habitat or aquatic or adjacent upland habitat.

The DMR stated that the proposed project should not cause any significant adverse impact to marine resources, traditional fishing, navigation, riparian access, or recreation. DMR stated the elimination of the existing post-supported access platform over the area of salt marsh would be beneficial. The use of float stops to keep the floats elevated off the mudflat at low tide would also be beneficial in preventing compaction of fine sediments and benthic infauna and loss of sediments through hydraulic pumping from the floats rising and falling in the water column.

The Maine Department of Inland Fisheries and Wildlife (MDIFW) reviewed the proposed project and stated the project site contains a high value Tidal Waterfowl and Wading Bird Habitat (TWWH) and a Shorebird Feeding Habitat. TWWH and Shorebird Feeding Habitats are regulated as Significant Wildlife Habitats under the NRPA. MDIFW states the proposed structure would extend more than 200 feet across the Significant Wildlife Habitats, bisecting the primary shorebird and waterfowl feeding areas at low tide during the boating season, and significantly intruding into the Significant Wildlife Habitat during the winter months when the area is primarily used by wintering waterfowl. MDIFW typically recommends denial of permanent structures in high value Significant Wildlife Habitats where no permanent structures exist, or where the proposed structure extends significantly further into the resource than existing permanent structures. This recommendation is based on documented avoidance behaviors of several priority species utilizing Significant Wildlife Habitats. Any permanent structure within this cove has the potential to impact wintering waterfowl use that MDIFW has documented as significant since 1983.

MDIFW stated that the impacts would be considerably lessened if the proposal was for a fixed pier of 4 feet wide by 100 feet long plus one 4-foot by 16-foot seasonal float which would not entirely bisect the Significant Wildlife Habitat and yet would increase tidal availability for the applicants. The Department contacted the applicants to discuss such a potential modification of their proposal. The applicants responded that the fixed pier plus one float configuration was not acceptable for them as it would only provide a 16-foot extension over the length of the existing seasonal float structure.

The Department finds that the applicants have failed to demonstrate that their proposed activity would not unreasonably harm Significant Wildlife Habitat. The Department finds that the proposal would be likely to cause an unreasonable impact on Tidal Waterfowl and Wading Bird Habitat and a Shorebird Feeding Habitat. The Department finds that there are practicable alternatives that would serve the project purpose that would be less damaging to the environment. The proposed project would not unreasonably harm freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life.

6. WATER QUALITY:

The applicants propose to use lumber treated with chromated copper arsenate (CCA) to construct the pier. To protect water quality, in a manner that exposes all surfaces to the air for 21 days.

If all CCA treated lumber were adequately cured on dry land prior to the start of construction the Department would not anticipate that the proposed project would violate any state water quality law, including those governing the classification of the State's waters.

BASED on the above findings of fact the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

- A. The proposed activity would not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
- B. The proposed activity would not cause unreasonable erosion of soil or sediment.
- C. The proposed activity would not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. The proposed activity would unreasonably harm a significant wildlife habitat because the project as designed would have an unreasonable impact on significant wildlife habitats and practicable alternatives to the project that would be less damaging to the environment exist. The proposed activity would not unreasonably harm freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life.
- E. The proposed activity would not unreasonably interfere with the natural flow of any surface or subsurface waters.

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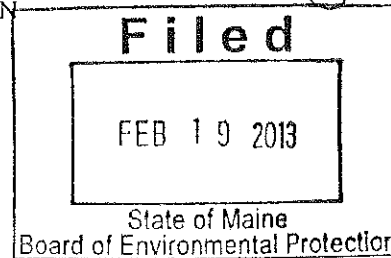
- F. The proposed activity would not violate any state water quality law including those governing the classifications of the State's waters provided the applicant meets the requirement of Finding 6.
- G. The proposed activity would not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- H. The proposed activity would not be on or adjacent to a sand dune.
- I. The proposed activity would not be on an outstanding river segment listed in 38 M.R.S.A. §480-P.

THEREFORE, the Department DENIES the above captioned application of RICHARD AND MARGERY READ to construct a residential pier.

DONE AND DATED IN AUGUSTA, MAINE, THIS 19<sup>th</sup> DAY OF February, 2013.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: Michael Kuhn for  
Patricia W. Aho, Commissioner



PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES...

ME/L25839ANBNCN/ATS#75531&75555&75556



# DEP INFORMATION SHEET

## Appealing a Department Licensing Decision

Dated: March 2012

Contact: (207) 287-2811

### **SUMMARY**

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's ("DEP") Commissioner: (1) in an administrative process before the Board of Environmental Protection ("Board"); or (2) in a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development (35-A M.R.S.A. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S.A. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S.A. § 636-A) must be taken to the Supreme Judicial Court sitting as the Law Court.

This INFORMATION SHEET, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

### **I. ADMINISTRATIVE APPEALS TO THE BOARD**

#### **LEGAL REFERENCES**

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S.A. §§ 341-D(4) & 346, the *Maine Administrative Procedure Act*, 5 M.R.S.A. § 11001, and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 CMR 2 (April 1, 2003).

#### **HOW LONG YOU HAVE TO SUBMIT AN APPEAL TO THE BOARD**

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed after 30 calendar days of the date on which the Commissioner's decision was filed with the Board will be rejected.

#### **HOW TO SUBMIT AN APPEAL TO THE BOARD**

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, c/o Department of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017; faxes are acceptable for purposes of meeting the deadline when followed by the Board's receipt of mailed original documents within five (5) working days. Receipt on a particular day must be by 5:00 PM at DEP's offices in Augusta; materials received after 5:00 PM are not considered received until the following day. The person appealing a licensing decision must also send the DEP's Commissioner a copy of the appeal documents and if the person appealing is not the applicant in the license proceeding at issue the applicant must also be sent a copy of the appeal documents. All of the information listed in the next section must be submitted at the time the appeal is filed. Only the extraordinary circumstances described at the end of that section will justify evidence not in the DEP's record at the time of decision being added to the record for consideration by the Board as part of an appeal.

#### **WHAT YOUR APPEAL PAPERWORK MUST CONTAIN**

Appeal materials must contain the following information at the time submitted:

1. *Aggrieved Status.* The appeal must explain how the person filing the appeal has standing to maintain an appeal. This requires an explanation of how the person filing the appeal may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions or conditions objected to or believed to be in error.* Specific references and facts regarding the appellant's issues with the decision must be provided in the notice of appeal.
3. *The basis of the objections or challenge.* If possible, specific regulations, statutes or other facts should be referenced. This may include citing omissions of relevant requirements, and errors believed to have been made in interpretations, conclusions, and relevant requirements.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those arguments specifically raised in the written notice of appeal.
6. *Request for hearing.* The Board will hear presentations on appeals at its regularly scheduled meetings, unless a public hearing on the appeal is requested and granted. A request for public hearing on an appeal must be filed as part of the notice of appeal.
7. *New or additional evidence to be offered.* The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered by the Board in an appeal only when the evidence is relevant and material and that the person seeking to add information to the record can show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process or that the evidence itself is newly discovered and could not have been presented earlier in the process. Specific requirements for additional evidence are found in Chapter 2.

#### **OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD**

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, made easily accessible by DEP. Upon request, the DEP will make the material available during normal working hours, provide space to review the file, and provide opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer questions regarding applicable requirements.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed the license normally remains in effect pending the processing of the appeal. A license holder may proceed with a project pending the outcome of an appeal but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

#### **WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD**

The Board will formally acknowledge receipt of an appeal, including the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, and any materials submitted in response to the appeal will be sent to Board members with a recommendation from DEP staff. Persons filing appeals and interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, a license holder, and interested persons of its decision.



## **II. JUDICIAL APPEALS**

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court, see 38 M.R.S.A. § 346(1); 06-096 CMR 2; 5 M.R.S.A. § 11001; & M.R. Civ. P. 80C. A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. Failure to file a timely appeal will result in the Board's or the Commissioner's decision becoming final.

An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S.A. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

### **ADDITIONAL INFORMATION**

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 287-2452 or for judicial appeals contact the court clerk's office in which your appeal will be filed.

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**Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.**

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